

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 298 of 1996.

Date of decision: 19.7.2007

Mehar Singh & ors.

..... Appellants.

Vs.

Amar Singh

.... Respondent.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?

**For the Appellants : Ms. Nidhi Chawla, Advocate vice
Mr. K.D.Sood, Advocate.**

For the Respondent : Mr. Ajay Kumar, Advocate.

Kuldip Singh, Judge (Oral).

The plaintiffs are in appeal against judgement and decree, dated 15.6.1996, passed by District Judge, Hamirpur, in Civil Appeal No. 35 of 1992. The parties are referred in the same manner, as in the trial court.

2. The brief facts are that plaintiffs filed a suit for permanent prohibitory injunction, restraining the defendant from obstructing the passage shown by letters A, B, C, D, in the site plan and in case any obstruction is caused during the pendency of the suit, then suit for mandatory injunction for removing the said obstruction. The further case of the plaintiffs is that their house is situated in Khata No. 33, Khatauni No. 34, Khasra Nos. 33, 92, 144, measuring 26

Whether the reporters of the local papers may be allowed to see the Judgment?

Kanals 2 Marlas, vide jamabandi for the year 1986-87, Tika Plasi, Mauza Balduhak, Tehsil Nadaun, District Hamirpur. The house of the defendant is situated adjacent to the house of the plaintiffs. The courtyard of the plaintiffs is common with defendant to some extent. The plaintiffs have been using the courtyard in front of the house of the defendant as passage, which is shown by letters A, B, C, D, in the site plan. It is the case of the plaintiffs that they have acquired right of passage by way of prescription through the courtyard shown by letters A, B, C, D, in the site plan. The plaintiffs have also pleaded that there is a custom prevalent in the village that the courtyard of others can be used as a passage for coming and going or for carrying the household articles. The plaintiffs have also acquired customary right through the passage shown by letters A, B, C, D, in the site plan. The defendant has no right to close the passage. On these grounds, the plaintiffs filed the suit.

3. The defendant contested the suit by taking preliminary objections that plaintiffs have no cause of action, no easementary right is available to the plaintiffs, the suit is bad for non-joinder of necessary parties, suit has not been properly valued for purposes of court fee and jurisdiction and the site plan attached with the plaint is not correct. On merits, the defendant has alleged that the plaintiffs have covered their own courtyard by constructing Varandah. Now they are interfering in the user of the courtyard of the defendant. The Gram Panchayat also inspected the spot and found the plaintiffs at fault. There is no passage of plaintiffs through the courtyard of the defendant. It has been denied that there is any common courtyard of

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the plaintiffs and they have no right of passage through the courtyard of the defendant. The defendant denied that there is any custom in the village to pass through the courtyard of the others. The learned Senior Sub Judge recorded a finding that plaintiffs had a right of passage through the suit land by way of custom and the suit was decreed on 3.2.1992 for permanent prohibitory injunction only. The defendant filed an appeal, which was allowed by the learned District Judge and the suit of the plaintiffs was dismissed on 15.6.1996. The plaintiffs are thus in second appeal.

4. The appeal was admitted on the following substantial questions of law:-

1. Whether the learned Distt. Judge has misconstrued the pleadings of the parties and wrongly assumed that the plea or ingredients of easement by prescription and customary easement had not been pleaded or proved?
2. Whether on the material on record, it was established that the plaintiff had acquired the right of passage by prescription and customary easement through the courtyard of the defendant?
3. Whether on the material on record when it was established that the plaintiff was the co-sharer, he could seek an injunction against the other co-sharers who were obstructing the user of passage on the joint land?
4. Whether the findings of the court below are vitiated because of appreciation of oral and documentary evidence particularly, Exh. PW 5/A and PW 5/B?

5. I have heard the learned counsel for the parties and have gone through the record.

6. The learned counsel appearing for the plaintiffs-appellants has submitted that the trial court decreed the suit on the basis of custom only and not on the basis of prescription, though it was pleaded by the plaintiffs. The learned lower appellate court considered the easement by way of prescription and customary easement in the impugned judgement, decree and plea of custom pleaded by the plaintiffs and accepted by the trial court was not considered. The non-consideration of plea of custom by District Judge in the impugned judgement and decree, has caused prejudice to the plaintiffs. The learned District Judge without considering the plea of custom has accepted the appeal and dismissed the suit.

7. The learned counsel for the defendant- respondent has supported the impugned judgement and decree. He has submitted that no substantial question of law is involved in the appeal, which requires determination. The District Judge has appreciated the material on record and has rightly dismissed the suit.

Substantial questions of law No. 1 to 4:

8. The substantial questions of law No. 1 to 4, are interconnected and the same are being disposed of collectively.

9. The perusal of impugned judgement, decree would show that the District Judge has considered easement by way of prescription, under Section 15 and customary easement, under Section 18 of the Easement Act, 1882. A customary easement, under Section 18 is not a customary right. A customary right is for

the benefit of all the persons, who reside in the locality and it arises out of custom of the locality. It does not depend upon any dedication, grant or any prescription. The distinction between customary easement and customary right has been ably set forth in Frederik Peacock's well-known treatise on the Law Relating to Easements in British India, at page 205 of the Second Edition, as follows:-

“Customary easements, as they are called in Sec. 18 of the Indian Easements Act, should be distinguished from the customary rights referred to in Sec. 2 Cl. (b) of the same Act. The latter are rights arising by custom, but unappurtenant to a dominant tenant. No fixed period of enjoyment is necessary to establish these rights but the custom must be reasonable and certain.”

10. In Ram Chandra Sah vs. Abdul Hannan and others

[AIR 1984 Patna 313], it has been held, in para-20, as follows:-

“It seems, the lower appellate Court has failed to appreciate as to what ‘customary right’ and ‘easement’ are. A customary right is not easement. An easement belongs to a determinate person or persons in respect of his or their land. A fluctuating body like the inhabitants of the locality cannot claim an easement. Easements are private rights belonging to particular persons, while customary rights are public rights annexed to the place in general. It is again well settled that the customary right is also different from customary easement. An easement is always appurtenant to the dominant tenement and inseparably attached to it and cannot be severed from it....”

11. It is thus clear that customary easement is different from customary right. The District Judge has not considered the case of

the plaintiffs on the basis of customary right. The District Judge has thus erred in dismissing the suit of the plaintiffs without considering the plea of plaintiffs regarding custom. In the facts and circumstances of the case, the case is required to be looked into by the District Judge again. The substantial questions of law No. 1 to 4, are disposed of accordingly.

12. The result of the above discussion is the appeal is allowed. The impugned judgement and decree are set-aside and case is remanded to the District Judge, Hamirpur, for disposal afresh in accordance with law uninfluenced by any observation made by this court on the merits of the case. The parties through their counsel are directed to appear before the District Judge, Hamirpur on 20.8.2007. The Registry is directed to send the records of the courts below, so as to reach there well before the date fixed. The learned District Judge is directed to decide the appeal expeditiously and preferably by 31st January, 2008. No costs.

July 19, 2007.
(Hem)

(Kuldip Singh)
Judge.